Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	
	)	
Accelerating Wireline Broadband Deployment by	)	WC Docket No. 17-84
Removing Barriers to Infrastructure Investment	)	WT Docket No. 16-421

Comments on the Draft Declaratory Ruling and Third Report and Order

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A. Introduction

On behalf of the Washington Cities of Bremerton, Mountlake Terrace, Kirkland, Redmond, Issaquah, Lake Stevens, Richland, and Mukilteo (collectively, "Washington Joint Cities"), we respectfully submit these comments asking that the Federal Communication Commission ("FCC") decline to adopt the draft Declaratory Ruling and Third Report and Order ("Draft Order").

Though the Washington Joint Cities look forward to the development of Small Wireless Facilities in their jurisdictions, the Washington Joint Cities are also guardians of public safety, specifically regarding decisions made in the public right-of-way. Local jurisdictions should not be stripped of their state constitutional authority to control public health, safety, and welfare, specifically including aesthetics, in the public right-of-way. Moreover, as the Draft Order is currently written, the Order would constitute a violation of the Washington State Constitution's prohibition against the gifting of public funds to a private party.[1] The Washington Joint Cities do not believe that the FCC has the authority through its interpretation of Sections 332 and 253 to preempt local rights and the Washington State Constitution.[2] Further, the FCC erroneously stretches its interpretation of "may prohibit or have the effect of prohibiting" from Section 253(a) to grant it authority to regulate municipal rates when such authority is specifically precluded by Congress in Section 224.[3]

B. Discussion

1. *FCC Lacks Authority to Define Small Cell*

The Washington Joint Cities do not believe that the FCC has authority to create a definition of Small Wireless Facilities. The FCC provides no basis in the record establishing its legal authority to adopt this definition and further only notes the proposed definition in a footnote.[4] In fact, the passing mention of the definition provides no explanation for the FCC's authority to adopt a definition, but instead focuses on the perceived authority to adopt fee limits: "We thus clarify the particular standard that governs the fees and charges that violate Sections 253 and 332 when it comes to the Small Wireless Facilities at issue in this decision. Namely, fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality's reasonable costs."[5]

The FCC fails to engage in any discussion of the volumetric or height requirements within this Draft Order and provides no citation to either industry or municipal commentary on the size of Small Wireless Facilities. The adoption of the definition appears almost as an after-thought (which becomes clearer when reviewing the inconsistencies described below). However, this definition will dramatically alter existing city codes and procedures, as well as preempt state laws which define Small Wireless Facilities. The

[1] Wash State Const., Art. 8, Sec. 7.

[2] *Tennessee v. Fed. Commc'ns Comm'n*, 832 F.3d 597, 610 (6th Cir. 2016); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S.Ct. 1555 (2004). (In order to preempt State law, the FCC must satisfy the "clear statement" rule which applies when federal-government preemption results in interposing federal authority between a State and its municipal subdivisions.)

[3] 47 USC 224

[4] *See* Draft Order, para. 11 fn. 3.

[5] *See* Draft Order, para. 11. Footnote 3 follows the first sentence quoted above.

downstream ramifications of adopting a definition are profound and have not properly been taken into account by the FCC.

The Washington Joint Cities hereby request that the FCC not define Small Wireless Facilities because it both lacks the authority to do so and because any definition fails to consider the impact to municipal infrastructure and right-of-way such definition will cause.

a. Inconsistency with 47 CFR 1.1312

The Washington Joint Cities advocate for no definition of Small Wireless Facilities. However, we believe it is important to point out that the proposed definition differs from the definition previously adopted by the FCC in 47 CFR 1.1312(e)(2). Further, not only does the draft definition in the proposed rule 47 CFR 1.6002 deviate from 47 CFR 1.1312(e)(2), it also deviates from footnote 3 on page 3 of the Draft Order. Specifically, the inconsistency occurs in subsection (1)(i) and (iii) of the proposed rule related to the height of the structure and subsection (3) related to the equipment box.

The relevant portion of the proposed rule 47 CFR 1.6002 is reproduced below, the underlined subsections identifies the inconsistencies

(l) Small wireless facility, consistent with Section 1.1312(e)(2), is a facility that meets each of the following conditions:

(1) The structure on which antenna facilities are mounted—

(i) Is 50 feet or less in height, or

(ii) Is no more than 10 percent taller than other adjacent structures, or

(iii) Is not extended to a height of more than 10 percent above its preexisting height as a result of the collocation of new antenna facilities; and

(2) Each antenna (excluding associated antenna equipment) is no more than three cubic feet in volume; and

(3) All antenna equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume; and …

Compare the above proposed rule to the underlined sections of 47 CFR 1.1312(e)(2):

(2) Where the deployment of facilities meets the following conditions:

(i) The facilities are mounted on structures 50 feet or less in height including their antennas as defined in § 1.1320(d), or the facilities are mounted on structures no more than 10 percent taller than other adjacent structures, or the facilities do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

(ii) Each antenna associated with the deployment, excluding the associated equipment (as defined in the definition of antenna in § 1.1320(d)), is no more than three cubic feet in volume;
(iii) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and

The inconsistencies in these definitions will cause confusion considering that the FCC cross references 47 CFR 1.1312 in its proposed rule.

b. Unintended Consequences of Including Height Requirements in the Definition

When reviewing both the proposed rule and 47 CFR 1.1312(e)(2) in connection with the new FCC definition of structure, the Washington Joint Cities also identified a likely unintended problem with the definition which could potentially allow nearly unlimited height for the Small Cell Facility. The stated premise behind the height limitations is the perceived limited impact such facilities will have compared to existing structures and the advocation of such height limitations by AT&T (and other carriers).[6] However, the definition adopted by the FCC could lead to impractical outcomes. The second limitation on height in 47 CFR 1.1312(e)(2) allows a deviation for facilities that are "mounted on structures no more than 10 percent taller than other adjacent structures." Under this standard, since "structures" include buildings, a new pole could be larger than an adjacent skyscraper. This is not the allowance the FCC intended.[7]

Rather than defining the height of the structure for the purposes of 47 CFR 1.6002, the Washington Joint Cities suggest that the FCC eliminate the height of the structure from the definition altogether. Instead, if the FCC determines that it has authority and a definition is needed, then similar to many states that have adopted definitions, the Washington Joint Cities suggest that the definition of Small Wireless Facilities focus solely on the volumetric standards of the antennas and associated equipment.[8] Limiting the definition to those standards will continue to enable the FCC's goal of streamlined deployment without the unintended consequences of incongruent structures in the rights-of-way. The decision related to the height of the Small Wireless Facility would be left to the design standards made publicly available by a municipality, and therefore consistent with its streetscape.

In the alternative, though we do not believe the FCC has authority to adopt a definition of Small Wireless Facility nor that a definition is needed, the Washington Joint Cities suggest the following definition:

(l) Small wireless facility is a facility that meets the following conditions:

(1) The structure on which antenna facilities are mounted —

[6] *See* Second Report and Order, WT. Docket 17-79, pages 27-28.
[7] *See* Second Report and Order footnote 132, citing to Verizon comments "Small cell antenna sizes are much smaller – three cubic feet or less per antenna – and are mounted predominately on existing (or replacement) structures at a height of 60 feet or less. In short, these deployments bear little resemblance to macro facilities that represented most wireless siting in 2004."
[8] *See, e.g.,* Wash. Code § 80.36.375(2)(d); Ariz. Stat. § 11-1801; Ind. Code § 8-1-32.3-9; Ia. Code § 8C.2; Minn. Stat. § 237.162; N.C. Gen. Stat § 160A-400.51.

(i) is not a historic or decorative structure; and

(ii) the facilities, including the antenna, do not extend an existing structure by more than 10% or five feet, whichever is greater; or

(iii) if on replacement structure located in the right-of-way, the structure is no more than 10 percent or 5 feet taller, whichever is greater, than the structure it replaces, including the antenna, or in the case of new structures located in the right-of-way, not more than 10 percent or 5 feet taller, whichever is greater, than adjacent poles on the same side of the right-of-way.

The above height definition is intended to eliminate the unintentional consequence of building a new pole the height of adjacent tall buildings. Further, Subsection 1(i), which eliminates historic or decorative structures from being covered under the definition, is consistent with previous FCC acknowledgment of the integrity of historic properties and districts. The placement of multiple antennas and 28 cubic feet equipment boxes on such structures would drastically alter the decorative and historic appearance of these poles and would not be "consistent with the quality and appearance of the original pole."[9]

Subsection (1)(ii) is designed to recognize that the height of the poles varies by location. For example, in a residential neighborhood, utility poles may be 20-35 feet versus in an industrial zone the poles may be above 50 feet.

Lastly, Subsection (1)(iii) accommodates the placement of new and replacement poles but eliminates the hazard of allowing a pole that overwhelms existing adjacent poles. Allowing replacement poles of 50 feet within a neighborhood that has shorter poles would overwhelm the street and the landscape of the area. Nor is such height reasonably necessary to accommodate a Small Wireless Facility. This revision is further supported by the FCC's own comments in the *2017 Pole Replacement Order* regarding the height of utility poles (which are typically taller than light standards):

> "Utility poles are typically 25 to 40 feet tall, and we find that an increase in height limited to 10 percent or five feet would be *de minimis* and thus would have no potential to affect historic properties. The flexibility of the five foot alternative addresses concerns expressed in the record that manufacturers typically offer standard utility poles in five-foot increments, and that a height increase of less than five feet often may be insufficient to accommodate new antennas or other equipment on a pole while maintaining the necessary separation from preexisting infrastructure on the pole."[10]

c. Antennas

The Washington Joint Cities further identify that the FCC's proposed Small Wireless Facilities definition leaves open the possibility of an infinite number of antennas on a structure, which may have the effect of overwhelming the design of the structure and the aesthetic of the right-of-way itself. The Washington Joint Cities recommend the following modification to the definition as underlined below:

[9] *See 2017 Pole Replacement Order*, 32 FCC Rcd 9760, 9767, para. 17.
[10] *See 2017 Pole Replacement Order*, 32 FCC Rcd 9760, 9768, para. 19.

(ii) Each antenna associated with the deployment, excluding the associated equipment (as defined in the definition of antenna in § 1.1320(d)), is no more than three cubic feet in volume, with a cumulative total antenna volume not to exceed nine (9) cubic feet.

The above definition does not cap the number of antenna that may be placed on a structure. Rather, it focuses on defining the cumulative total volume, similar to the cap on volume used for associated equipment.

d. Associated Equipment

The 28 cubic feet for associated equipment allotted by the FCC in its definition is quite substantial and could greatly overpower a 25-foot pole. Further, such a large equipment allocation is inconsistent with the trend by the wireless industry to build smaller equipment boxes. By defining Small Wireless Facilities to include 28 cubic feet in volume for equipment, the FCC fails to encourage smaller deployments. The Washington Joint Cities recommend that the FCC adopt a smaller volumetric parameter and incorporate the broader 47 CFR § 1.1312(e)(2) definition which included any "pre-existing associated equipment on the structure," with some slight modification:

(iii) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing equipment on the structure associated with personal wireless services, is the minimum volume necessary to house the wireless equipment and is no more than 17 cubic feet in volume;

e. Eligible Facilities Requests

Lastly, the Washington Joint Cities request that the FCC exempt facilities built as Small Wireless Facilities from eligible facilities requests. The volumetric definitions of the Small Wireless Facilities are designed around their compact size and volume. Without a stated exemption from the FCC, a Small Wireless Facility may in fact grow significantly, beyond the volumetric definitions of a Small Wireless Facility, by the application of an eligible facilities request. Accordingly, the Washington Joint Cities request the following addition to the definition of Small Wireless Facilities:

(7) Is ineligible for to an eligible facilities request as defined in 47 CFR § 1.40001.

Further, the proposed rules attached to the Draft Order include a single sentence directing the redesignation of Section 1.40001 as Section 1.6100 and for the removal and reservation of paragraph (a) of that section. This proposal moves wireless facilities modifications, including eligible facilities requests, to the new Section 1.6100 and eliminates paragraph "a" from Section 1.40001.

These changes are improper for two reasons. First, the FCC failed to include this substantive proposed rule change in its rule making process. Why is the FCC eliminating paragraph "a" from Section 1.40001 – the very paragraph that describes the basis for the implementation of Section 1.40001 and basic explanation of an eligible facility request? There was no discussion of this change, no opportunity to comment, and no support for this proposed change. Second, Section 1.40001 contains definitions that are not included or applicable in proposed section 1.6002 – *Definitions.* Re-codifying Section 1.40001 as Section 1.6100 will cause confusion with regard to the definitions. For example, *collocation* is defined differently between the proposed rule and 1.40001. Further, *transmission equipment* is used in eligible facilities requests while antenna equipment is used in the new definition of Small Wireless Facilities. The

Washington Joint Cities request that the Commission properly include this substantive change in a rule making process so that these issues can be discussed and commented upon, and if an alteration is necessary a harmonization of the rules.

2. Proposed Reduction in Threshold Review Time for Shot Clocks

Decreasing local jurisdiction's review time of wireless applications will create a significant adverse burden on local jurisdictions. Decreasing the amount of time local jurisdictions have to review applications will disrupt the review process already in place for many local jurisdictions. The consequence of this is a reduction in efficiency and an unnecessary reallocation of limited resources. The decreased review time also diminishes the autonomy that local jurisdictions are given to regulate their local rights-of-way.

The 2009 Declaratory Ruling indicated that the 150-day processing period was a practical standard, citing Washington and six other states as having 60 to 150-day timelines that were reasonable.[11] In addition, many states' recent adoption of small wireless facilities legislation include review periods that exceed the 60-day timeline proposed by this order.[12]

Just because a facility is small, does not mean that the review timeframe should be shorter. In fact, considering that Small Wireless Facilities are predominantly in the rights-of-way, there is a heightened level of review to adequately account for the public safety concerns that are necessarily raised when placing infrastructure of any kind in the public right-of-way. As supporting evidence for their decision to shorten the shot clocks, the FCC simply states that some jurisdictions are reviewing applications in less time.[13] However, this scant support does not justify the creation of these burdensome shot clocks.

Furthermore, unlike applications for wireless facilities on private property, many local jurisdictions require franchise agreements and leases for usage of the rights-of-way and municipally owned infrastructure (light poles). These kinds of agreements require council action and are unable to be granted via ministerial actions.[14] For example, in Washington, a franchise agreement must be heard at least twice by the local governing body at a regularly scheduled meeting before adopting a franchise agreement.[15] However, because many Washington councils only meet twice a month, at least 30 of the proposed 60-day review time is absorbed just in the council review process. This timeline makes it nearly impossible for a Washington city to accommodate both the federal and state requirements.

Accelerating wireless broadband deployment by decreasing local jurisdictions' review time will create a significant adverse burden on local jurisdictions. The FCC has not provided sufficient evidence of the need to create shot clock times for Small Wireless Facilities, nor that these facilities should be treated differently than other types of wireless facilities. The Washington Joint Cities request that the FCC decline to adopt shot clock timelines for the deployment of Small Wireless Facilities.

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[11] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14012, para. 48, n.152. (2009) ("*2009 Declaratory Ruling*").

[12] *See* HI Rev. Stat. Title 13 Section 6(8) applications will be processed within 90 days of receipt; OK Rev. Stat. Section 36-501(D)(7) applications must be processed within 75 days of receipt of the application.

[13] *See Draft Order* FCC-CIR 1809-02, para 107.

[14] RCW 35A.47.040 (outlining the requirements of local jurisdictions to adopt franchise agreements for public right-of-way) and § 34:1.Introduction, 12 McQuillin Mun. Corp. § 34:1 (3d ed.) (modern legislation delegates to the local authorities the exclusive dominion over the streets of the respective municipalities).

[15] RCW 35A.47.040.

3. Implementation timeline should be at least 180 days.

Though the Washington Joint Cities advocate for no adoption of this Draft Order, if the FCC adopts the Draft Order, the Washington Joint Cities respectfully request that the implementation timeline be extended from 30 days to 180 days.

In the Draft Order, local jurisdictions are asked to design new guidelines and procedures, implement revised shot clock timelines, and create additional review processes – all within 30-days of the final publication of the Declaratory Ruling and Third Report and Order. This type of complex procedural revision takes time and careful consideration by city staff, who then must compile a package of recommended changes for the local council to review. Furthermore, more detailed application requirements at the outset are mandated since pre-application meetings are discouraged due to the time limits on tolling the shot clocks. Moreover, this change is not made in a vacuum; local jurisdictions have a whole host of other pressing issues demanding time and consideration, specifically in the fall creating city budgets for the following year and recommending comprehensive plan amendments. Requiring a 30-day compliance schedule will result in local governments having to reprioritize their schedules and their staff members.

In many states' recent adoption of small wireless facilities legislation, the implementation period for compliance with the new legislation was well over the 30 days provided for in the Draft Order. Oklahoma's Senate Bill No. 1388 was passed by the Senate April 19, 2018, with an effective date of November 1, 2018. This provided for 196 days for local jurisdictions to come into compliance. Hawaii's HB 2651 was passed by the Senate June 22, 2018 and will apply to permit applications filed after December 31, 2018. This provides local governments 192 days to come into compliance. New Mexico's HB 38 was passed March 1, 2018, with an effective date of September 1, 2018, providing for 184 days for local governments to comply.

As evidenced by the timelines for coming into compliance with the changes in Oklahoma, Hawaii, and New Mexico, 30 days is simply not a realistic timeline within which to accomplish all that the Draft Order requires of local jurisdictions. In order to account for the time necessary to adequately review existing policies and draft recommended changes, as well as the time for councils to review and adopt the proposals, we are respectfully requesting that if the FCC decides to move forward with the Draft Order, that it does not make it effective until 180 days after publication.

C. Summary

The Washington Joint Cities request that the FCC take the necessary time now, before adoption, to consider and address the substantial number of problematic proposed changes that have been identified in this comment as well as comments made by numerous others. Failure to address these issues before adoption will result in an ineffective and turbulent rollout of Small Wireless Facilities within local jurisdictions across this country. These proposed changes, which include unattainable review timelines, confusing definitions, and excessively large volumetric allowances, will hamper local government efforts to effectively manage their rights-of-way. Further, the FCC unreasonably proposes to expand its authority in Section 253 and Section 332 by redefining effective prohibition and granting itself preemptive authority over the rental of municipal owned structures. The Washington Joint Cities therefore request that the FCC decline to adopt the Draft Order.